Shen & Sons Sdn Bhd v Jutawarna Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–1336 OF 2005
S NANTHA BALAN J
31 JULY 2015

Civil Procedure — Pleadings — Failure to plead special damages and aggravated/exemplary damages — Whether special damages must be pleaded — Whether permissible to adduce evidence as to special damages during hearing when special damages had not been pleaded in statement of claim — Whether defendants precluded from raising plaintiff's failure to plead special damages during appeal when no objection was taken during hearing of assessment of damages — Whether amount awarded as special damages should be set aside — Whether aggravated/exemplary damages should be specifically claimed as relief in statement of claim — Whether plaintiff precluded from claiming aggravated/exemplary damages when factual basis for aggravated/exemplary damages had not been set out in statement of claim — Whether award for aggravated/exemplary damages should be set aside — Whether sum of RM150,000 awarded as general damages outrageous or excessive

The plaintiff was the registered proprietor of a property situated in Kuala Lumpur, while the defendants were involved in the construction of 40 units of condominiums ('the project') on lands located next to the plaintiff's property. The third defendant was the main contractor for the project, who had nominated the second defendant as the subcontractor of the project, and the first defendant was directly involved in the construction process. It was the plaintiff's claim that its property had been damaged by the defendants' construction activities in the adjoining property. According to the plaintiff, the defendants and their employees or agents had been negligent while carrying out their construction works and their failure to adopt the necessary precautionary measures to alleviate excessive vibrations had resulted in extensive damage to the plaintiff's property. Although the second and third defendants argued that they had adopted the necessary precautionary measures to stop the alleged vibrations, the trial judge had found liability against the defendants and ordered that damages be assessed by the senior assistant registrar ('the SAR'). The SAR assessed damages and awarded the plaintiff special damages (for the costs it had incurred, rectification costs and other related costs) in the sum of RM865,769.65, general damages in the sum of RM150,000 and aggravated and exemplary damages of RM100,000. The SAR ruled that the three defendants were to jointly pay the plaintiff a total sum of RM1,115,769.85, with no order as to costs. The plaintiff appealed against the

SAR's ruling that there would be no order as to costs, while the second and third defendants appealed against the SAR's decision to award the plaintiff damages of RM1,115,769.85. It was the defendants' submission that the items that were allowed as special damages and aggravated/exemplary damages were not pleaded or particularised and were therefore erroneously allowed by the SAR. In response the plaintiff submitted that since the defendants had not objected to the plaintiff's failure to plead special damages during the hearing of assessment of damages before the SAR, they were precluded from raising this issue in this appeal. The plaintiff further submitted that so long as the items that were being claimed as special damages were presented by way of witness statements and proven by way of oral and documentary evidence, the claim should be allowed regardless of whether it was pleaded in the statement of claim.

Held, allowing the defendants' appeal in part with no order as to costs and dismissing the plaintiff's appeal with no order as to costs:

(1) During the hearing of assessment of damages before the SAR, the defendants had attempted to revisit the issues pertaining to causation but the SAR had correctly not taken into account these allegations. Once liability had been established it was impermissible for the defendants to reopen the causation issue during the hearing of assessment of damages. As such, the SAR could not be faulted for ignoring the issue of causation, which had been subsumed in the decision on liability (see para 27).

(2) The cumulative effect of O 18 r 12(1) and (2) of the Rules of Court 2012 ('the ROC 2012') is that all relevant particulars in relation to special damages had to be pleaded. Apart from the ROC 2012, the body of case law, which was clear and unambiguous, had emphasised that the plaintiff who was claiming for special damages had to specifically plead and provide the particulars of the same in its pleading. The rationale for this requirement was to ensure that a defendant was not taken by surprise at the trial and would know the exact nature of the case he had to meet at the trial. In the present case, it was clear from a perusal of the statement of claim that there were neither any particulars of special damage nor any prayer for special damages. The procedural rule relating to pleading special damages was simple but strict, i.e. if the statement of claim was devoid of any pleading on special damages, the evidence on special damages could not be adduced. The plaintiff had also made no attempt to amend the statement of claim prior to the hearing of assessment of damages. In such circumstances, the defendants' silence or failure to object when the plaintiff adduced evidence on special damages could not be deemed as a waiver (see paras 55, 57, 63, 68–70 & 102).

(3) In addition the fact that the defendants' had not objected to the plaintiff adducing evidence on special damages during the hearing of assessment

of damages before the SAR, did not amount to a waiver on their part and they were not precluded from raising the inadequacy or absence of pleadings for special damages as a ground of appeal during this appeal. This was because the issue was still alive and extant. As such, the award of RM211,656.65 (costs incurred) and RM654,113 (rectification costs) although proved, had to be set aside as these were not pleaded (see paras 48–49, 71 & 76).

(4) There was also no prayer, any special facts or any particulars for aggravated/exemplary damages in the plaintiff's statement of claim. Although the failure to specifically claim aggravated/exemplary damages as a relief was not necessarily fatal, it was desirable that it be claimed as a specific relief in the statement of claim. In terms of aggravated/exemplary damages, there was also the added requirement under O 18 r 12 (1)(b) of the ROC 2012 that matters relating to the state of mind had to be pleaded. The so-called mental distress or the hurt feelings that the plaintiff's directors or staff or shareholders claimed to have suffered ought to have been but was not pleaded. The plaintiff's reliance on the 'Particulars of Negligence' in the statement of claim as the basis for claiming aggravated/exemplary damages was totally misplaced. As such, the defendants' objection to lack of pleadings for aggravated/exemplary damages was well taken and ought to have been upheld by the SAR. It was therefore an error of principle and misdirection on the part of the SAR to award aggravated/exemplary damages when the statement of claim was bereft of the claim and totally devoid of necessary particulars in support of such claims. The evidence provided by the plaintiffs' witness statements and their oral testimony could not make up for the inadequacy of the pleadings. As such, the award of aggravated/exemplary damages of RM100,000 was also set aside (see paras 77 & 83–88).

(5) The sum of RM150,000 awarded as general damages was not so outrageous or excessive as to warrant appellate intervention. The general rule in appeals of this nature was that the quantum awarded should not be interfered with unless it was so excessive as to be unreasonable. In the present case the sum of RM150,000 awarded was neither unreasonable nor excessive as to warrant appellate intervention. As such this part of the SAR's award remained intact and to that extent the defendants' appeal was not allowed (see paras 100–101).

(6) In view of the ruling on the defendants' appeal, the plaintiff's appeal became redundant and was accordingly dismissed (see paras 12 & 103).

[Bahasa Malaysia summary

Plaintif ialah pemilik berdaftar sebuah hartanah yang terletak di Kuala Lumpur, manakala defendan-defendan terlibat dalam pembinaan 40 unit kondominium ('projek tersebut') atas tanah yang terletak bersebelahan

hartanah plaintif. Defendan ketiga ialah kontraktor utama untuk projek tersebut, yang telah mencalonkan defendan kedua sebagai subkontraktor projek tersebut, dan defendan pertama terlibat secara langsung dalam proses pembinaan. Ia adalah tuntutan plaintif bahawa hartanahnya telah dirosakkan oleh aktiviti-aktiviti pembinaan defendan-defendan di hartanah bersebelahan. Menurut plaintif, defendan-defendan dan pekerja atau ejen mereka telah cuai semasa menjalankan kerja pembinaan mereka dan kegagalan mereka untuk mengambil langkah berjaga-jaga yang perlu bagi mengelakkan gegaran melampau telah mengakibatkan kerosakan teruk kepada hartanah plaintif. Walaupun defendan-defendan kedua dan ketiga berhujah bahawa mereka telah mengambil langkah berjaga-jaga yang perlu untuk menghentikan gegaran yang dikatakan itu, hakim perbicaraan mendapati liabiliti terhadap defendan-defendan dan memerintahkan ganti rugi ditaksir oleh penolong kanan pendaftar ('PKP'). PKP menaksir ganti rugi dan mengawardkan plaintif ganti rugi khas (untuk kos yang ditanggungnya, kos pembetulan dan kos berkaitan yang lain) sejumlah RM865,769.65, ganti rugi am sejumlah RM150,000 dan ganti rugi tambahan dan teladan sejumlah RM100,000. PKP memutuskan bahawa ketiga-tiga defendan perlu membayar bersama plaintif jumlah keseluruhan RM1,115,769.85, tanpa perintah untuk kos. Plaintif merayu terhadap keputusan PKP bahawa tiada perintah untuk kos, manakala defendan-defendan kedua dan ketiga merayu terhadap keputusan PKP untuk mengawardkan plaintif ganti rugi sejumlah RM1,115,769.85. Ia adalah hujah defendan-defendan bahawa butiran-butiran yang dibenarkan sebagai ganti rugi khas dan ganti rugi tambahan/teladan tidak dipli atau diperincikan dan oleh itu telah tersalah dibenarkan oleh PKP. Sebagai jawapan plaintif berhujah bahawa oleh kerana defendan-defendan tidak membantah terhadap kegagalan plaintif untuk mempli ganti rugi khas semasa perbicaraan untuk pentaksiran ganti rugi di hadapan PKP, mereka dikecualikan daripada menimbulkan isu ini dalam rayuan ini. Plaintif selanjutnya berhujah bahawa selagi butiran-butiran yang dituntut sebagai ganti rugi khas dikemukakan melalui penyataan saksi dan dibuktikan melalui keterangan lisan dan dokumentar, tuntutan itu patut dibenarkan tidak kira sama ada ia telah diplikan dalam penyataan tuntutan.

Diputuskan, membenarkan rayuan defendan-defendan sebahagiannya tanpa perintah untuk kos dan menolak rayuan plaintif tanpa perintah untuk kos:

(1) Sepanjang perbicaraan pentaksiran ganti rugi di hadapan PKP, defendan-defendan telah cuba kembali kepada isu-isu mengenai penyebaban tetapi PKP dengan wajar tidak mengambil kira pengataan tersebut. Setelah liabiliti dibuktikan defendan-defendan tidak dibenarkan untuk membuka semula isu penyebaban semasa perbicaraan penaksiran ganti rugi. Oleh itu, PKP tidak boleh dipersalahkan kerana tidak mempedulikan isu penyebaban, yang termasuk dalam keputusan berhubung liabiliti (lihat perenggan 27).

(2) Kesan kumulatif A 18 k 12(1) dan (2) Kaedah-Kaedah Mahkamah 2012

('KM 2012') adalah agar semua butiran yang relevan berkaitan dengan ganti rugi khas perlu dipli. Selain daripada KM 2012, isi kes undang-undang, yang jelas dan tidak taksa, telah menekankan bahawa plaintif yang menuntut ganti rugi khas telah secara khusus mempli dan memberikan butiran yang sama dalam penghujahannya. Rasional untuk keperluan ini adalah untuk memastikan bahawa defendan tidak terkejut semasa perbicaraan dan akan mengetahui sifat sebenar kes yang perlu dihadapai semasa perbicaraan. Dalam kes ini, adalah jelas daripada penelitian penyataan tuntutan bahawa tiada apa-apa butiran berhubung ganti rugi khas ataupun apa-apa permohonan untuk ganti rugi khas. Kaedah prosedural berkenaan mempli ganti rugi khas adalah mudah tetapi tegas iaitu jika penyataan tuntutan tiada apa-apa pliding berhubung ganti rugi khas, keterangan berhubung ganti rugi khas tidak boleh dikemukakan. Plaintif juga tidak mencuba untuk meminda penyataan tuntutan itu sebelum perbicaraan untuk penaksiran ganti rugi. Dalam keadaan itu, sikap berdiam diri defendan-defendan atau kegagalan untuk membantah apabila plaintif mengemukakan keterangan berhubung ganti rugi khas tidak boleh dianggap sebagai penepian (lihat perenggan 55, 57, 63, 68–70 & 102).

(3) Tambahan pula fakta bahawa defendan-defendan tidak membantah apabila plaintif mengemukakan keterangan berhubung ganti rugi khas semasa perbicaraan pentaksiran ganti rugi di hadapan PKP, tidak merupakan penepian di pihak mereka dan mereka tidak dikecualikan daripada menimbulkan pliding yang tidak mencukupi atau tiada pliding untuk ganti rugi khas sebagai alasan rayuan semasa rayuan ini. Ini adalah kerana isu itu masih wujud. Oleh itu, award RM211,656.65 (kos yang ditanggung) dan RM654,113 (kos pembetulan) meskipun telah dibuktikan, perlu diketepikan kerana ia tidak diplikan (lihat perenggan 48–49, 71 & 76).

(4) Juga tidak ada permohonan, apa-apa fakta istimewa atau apa-apa butiran untuk ganti rugi tambahan/teladan dalam penyataan tuntutan plaintif. Walaupun kegagalan untuk menuntut secara spesifik ganti rugi tambahan/teladan sebagai relief tidak semestinya memudaratkan, ia adalah perlu dituntut sebagai relief spesifik dalam penyataan tuntutan. Berkenaan ganti rugi tambahan/teladan, terdapat juga keperluan tambahan di bawah A 18 k 12(1)(b) KM 2012 bahawa perkara-perkara berkaitan keadaan minda yang perlu diplikan. Gangguan mental atau perasaan sakit yang dikatakan telah dialami oleh pengarah atau kakitangan atau pemegang saham plaintif tidak diplikan. Kebergantungan plaintif pada 'Particulars of Negligence' dalam penyataan tuntutan sebagai asas menuntut ganti rugi tambahan/teladan adalah tidak betul. Oleh itu, bantahan defendan-defendan yang tiada pliding untuk ganti rugi tambahan/teladan patut diterima dan dikekalkan oleh PKP. Okeh itu terdapat kesilapan prinsip dan salah arah

di pihak PKP untuk mengawardkan ganti rugi tambahan/teladan apabila penyataan tuntutan tiada tuntutan itu dan memang tiada butiran-butiran yang perlu untuk menyokong tuntutan sedemikian. Keterangan yang dikemukakan oleh kenyataan-kenyataan saksi plaintif dan keterangan lisan mereka tidak boleh menampung pliding yang tidak mencukupi itu. Oleh itu, award untuk ganti rugi tambahan/teladan sejumlah RM100,000 juga diketepikan (lihat perenggan 77 & 83–88).

(5) Jumlah RM150,000 yang diawardkan sebagai ganti rugi am tidak melampau atau terlalu banyak untuk mewajarkan campur tangan mahkamah rayuan. Rukun am dalam rayuan bersifat sebegini adalah di mana kuantum yang diawardkan tidak patut diganggu kecuali ia terlalu banyak sehingga tidak munasabah. Dalam kes ini jumlah RM150,000 yang diawardkan bukan sahaja tidak munasabah atau terlalu banyak sehingga mewajarkan campur tangan. Oleh itu bahagian award PKP ini dikekalkan dan rayuan defendan-defendan tidak dibenarkan (lihat perenggan 100–101).

(6) Berdasarkan keputusan berhubung rayuan defendan-defendan, rayuan plaintif menjadi lewah dan oleh itu ditolak (lihat perenggan 12 & 103).]

Notes

For cases on pleadings in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6761–7633.

Cases referred to

Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354; [2010] 1 LNS 980, HC (folld)

Flint v Lovell [1935] 1 KB 354, CA (refd)

Ilkiw v Samuels and Others [1963] 2 All ER 879, CA (refd)

John Andrew Malthouse v Cyril Steven & Ors [2015] 7 MLJ 548, HC (refd)

Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13; [2007] 4 CLJ 293, CA (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6, CA (refd)

Pal Associates Sdn Bhd v The Syndicate of the Press of the University of Cambridge being authorised by the Chancellor Masters and Scholars of the University of Cambridge [2014] 10 MLJ 728, HC (refd)

Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Whalley and others v PF Developments Ltd and another [2013] EWCA Civ 306, CA (refd)

A *Yeah Eh Farn v Alliance Bank (M) Bhd* [2014] 3 CLJ 803; [2013] 1 LNS 829, HC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 12(1), (1)(b), (2), O 56 r 1, 1(3A)
B Rules of the High Court 1980 O 18 r 12(1), (2), O 56 r 1

Preeti Shah (Yap Liew & Partners) for the plaintiff.
K Ramesh (Lynn Johnson with him) (Chellam Wong) for the second and third defendants.
C *Silva Velu (Silva Vellu & Co) for Mui Continental Insurance Bhd.*

S Nantha Balan J:

INTRODUCTION

D

[1] In this case, I had set aside the registrar's awards of special damages as well as aggravated/exemplary damages on the ground that the procedural rules and principles relating to pleadings on damages were not observed. This judgment therefore underscores the need for strict adherence to and
E compliance with the basic rules of pleadings vis a vis claims for damages.

[2] The plaintiff had filed this action against the defendant for, inter alia, damages which were caused to the plaintiff's property due to the construction
F works that were being carried out by the defendants on the adjoining property. This judgment relates only to the assessment of damages. Liability for negligence/nuisance against the Defendants had been established previously in this action.

G **[3]** After liability had been found against the defendant, damages were assessed by the learned senior assistant registrar ('SAR'). Thereafter, the plaintiff, the second defendant ('D2') and the third defendant ('D3') lodged appeals by way of notices of appeal to the judge in chambers pursuant to O 56 r 1 of the Rules of Court 2012. The first defendant ('D1') did not participate
H in the assessment of damages.

[4] At the conclusion of the proceedings herein, I partially allowed the appeal by D2 and D3 and set aside a sum of RM865,769.65 (RM211,656.65 plus RM654,113) which the plaintiff had claimed as costs and expenses. I also
I set aside a sum of RM100,000 being aggravated and exemplary damages which had been awarded by the learned SAR.

[5] These are my grounds of judgment in respect of encls 82 and 83, which are appeals against the decision of the SAR dated 22 April 2013 who had

conducted the hearing on assessment of damages after judgment on liability had been handed down previously by the learned judicial commissioner. The parties who are appealing are the plaintiff ('encl 82') and D2 and D3 ('encl 83').

THE ISSUES

[6] As stated earlier, the issues that arise in these appeals pertain to the inadequacy or absence of pleadings in respect of a claim for special damages and aggravated and/or exemplary damages. The issues may be specifically stated as follows:

(a) whether special damages must be specifically pleaded;

(b) whether costs and expenses which were incurred or borne by the plaintiff (as a result of the tort committed by the defendants) and which had been duly proven by the plaintiff during the hearing of assessment of damages may be allowed, albeit that the statement of claim contains absolutely no pleading whatsoever with regards to the items that are being claimed as special damages;

(c) whether it is permissible for evidence as to special damages to be adduced during the hearing of assessment of damages when special damages has not been pleaded in the statement of claim;

(d) whether the defendants' failure to object to the evidence of special damages being adduced during hearing of assessment of damages before the SAR amounts to a waiver on the issue of inadequacy or absence of pleadings for special damages;

(e) whether the defendants' failure to object when evidence of special damages was adduced during the hearing of assessment of damages before the SAR precludes them from raising the inadequacy or absence of pleadings for special damages as a ground of appeal during the appeal to the judge in chambers;

(f) whether aggravated and/or exemplary damages must be specifically claimed as a relief in the statement of claim; and

(g) whether aggravated and/or exemplary damages may be claimed by the plaintiff notwithstanding that the particulars or the factual basis or matrix for aggravated and/or exemplary damages had not been set out in the statement of claim.

THE APPEALS

[7] After full trial, the learned judicial commissioner had found liability against the defendants and ordered that damages be assessed by the SAR. The SAR duly assessed damages against the defendants.

[8] The plaintiff appealed against that part of the SAR's decision where it was ruled that D1, D2 and D3 are to jointly pay the damages that were assessed and that there be no order as to costs (encl 82). As for D2 and D3, their appeal (encl 83) was against that part of the SAR's decision by which it was ruled that D2 and D3 (together with D1) are to pay damages as follows:

Item	Amount
i) Special damages	
Costs incurred	RM211,656.65
Rectification / related costs	RM654,113
ii) General damages	RM150,000
iii) Aggravated/exemplary damages	RM100,000
Total	RM 1,115,769.65

[9] The SAR also ordered that the defendants are to pay interest at 4%pa on the amount of damages that were assessed as stated above, calculated from 22 April 2013 until full settlement. D1 was wound up on 23 March 2012 and was absent during the hearing of assessment of damages. The present appeals before me only involve the plaintiff, D2 and D3.

[10] When the appeals came before me, counsel for the plaintiff abandoned her appeal against the ruling that D1, D2 and D3 are to jointly pay the damages that were assessed by the SAR. She however maintained the plaintiff's appeal in respect of the SAR's ruling that there be no order as to costs.

[11] At the conclusion of the proceedings in respect of both appeals, I made following ruling:

(a) the award of RM211,656.65 and RM654,113 (costs incurred and rectification/related costs) which were awarded as special damages be set aside;

(b) the award of RM100,000 as aggravated and exemplary damages be set aside;

(c) D2 and D3's appeal (encl 83) is allowed in part. No order as to costs; and

(d) the plaintiff's appeal – encl (82) is dismissed. No order as to costs.

[12] Briefly, the basis on which the appeal by D2 and D3 (encl 83) was allowed in part is that the items that were allowed as special damages and aggravated/exemplary damages were not pleaded (and not particularised) and were therefore erroneously allowed by the SAR. The relevant procedural rules and legal principles relating to pleadings for damages and the reasons for setting aside the award of special damages and aggravated/exemplary damages are

more fully discussed in the later part of this judgment. In view of my ruling on encl 83, encl 82 became redundant and was accordingly dismissed.

[13] In particular, in so far as special damages are concerned, I took the view that the plaintiff's pleadings were bereft of a claim for special damages as it was not specifically pleaded nor were they particularised. There was absolutely no mention about special damages in the statement of claim. I held that the omission to plead special damages was fatal, notwithstanding that there was evidence to prove these items of expense and costs.

[14] Essentially, I had ruled, inter alia, that the plaintiff's pleading was not in compliance with O 18 r 12(1) and (2) of the Rules of Court 2012. I also ruled that the statement of claim was not in compliance with the well established and I might add, elementary principle that special damages must be specifically pleaded.

[15] In this case, the plaintiff may well have proven special damages before the SAR but they have most certainly failed to plead the items that were being claimed in the statement of claim.

[16] In so far as aggravated and exemplary damages are concerned, there was first, no specific relief that was claimed in the statement of claim and secondly there were no particulars or any factual matrix in the statement of claim to support a claim for aggravated or exemplary damages.

[17] During the hearing of assessment of damages before the SAR counsel for D2 and D3 did raise a specific objection with regards to the absence of pleadings for aggravated and exemplary damages. However, they did not object to the claim for special damages. The plaintiff's claim for special damages was only introduced or placed before the SAR by way of the witness statements of the witnesses who testified on behalf of the plaintiff.

THE BACKGROUND FACTS

[18] I now turn to the facts which gave rise to the plaintiff's claim.

[19] The plaintiff is the registered proprietor of property known as 16A and 16B Jalan U-Thant, 55000 Kuala Lumpur respectively ('the plaintiff's property'). At the material time, D1 was in the process of constructing 40 units of condominiums on Lot 215, Lot 216 and Lot 84, Jalan Madge, Off Jalan U-Thant, Kuala Lumpur ('the project'). The lands on which the project was being developed were located next to the plaintiff's property.

[20] D2 is a foundation specialist and the nominated subcontractor of the project at the material time. D3 is a general construction contractor and was the main contractor for the project.

[21] By a letter of award dated 4 November 2004, D3 appointed D2 as the subcontractor to carry out earthworks, piling, basement and ground floor slab works – 'Package A' ('the construction works'). The construction works that were carried out by D2 included excavation works, installation and extraction of sheet piles and the construction of the foundation, basement and structure of the condominiums pertaining to the project.

[22] The plaintiff claims that the defendants, their employees, servants and/or agents were negligent in causing vibrations as a result of the constructions works and failed to adopt the necessary precautionary measures to alleviate excessive vibrations, thus resulting in the alleged damage to the plaintiff's property.

[23] As a result of the construction works, the plaintiff alleges that the following damage was caused to the plaintiff's property by the defendants:

(a) extensive cracks on the walls, driveway, floors, ceiling, front lawn tiles, concrete apron surrounding the plaintiff's property and in the garden;

(b) dislocation of doors, metal grill doors and glass sliding doors;

(c) tilting walls;

(d) leakages in the roof;

(e) leakages and damage to the entire piping system causing water to seep through the floor and undetected pipe leakage causing the water bill to escalate;

(f) damage to the electrical system;

(g) substantial soil erosion causing, inter alia, the boundary wall to collapse in several areas and falling of trees in the garden in the plaintiff's property;

(h) soil settlement; and

(i) substantial ground movement and/or settlement causing the floor in the living room to be uneven.

[24] D2 and D3 deny the plaintiff's allegations and maintained that prior to commencing the construction works, D3 employed an independent loss adjusting company; McLarens Saksama (M) Sdn Bhd to conduct a

dilapidation report on the plaintiff's property to take account of the prevailing condition of the said property. The survey was also conducted for the surrounding properties.

[25] In addition to the above, D2 and D3 carried out a deep boring and seismic survey in order to gather adequate sub-soil data. It is alleged that an examination of the soil prior to the commencement of the construction works was carried out to ensure of the safety of the plaintiff's property.

[26] As a result of the above, D2 and D3 assert that it is erroneous for the plaintiff to claim that D2 and D3 had failed to adopt the necessary precautionary measures to stop the alleged vibrations.

[27] During the hearing of assessment of damages before the SAR, D2 and D3 had attempted to revisit the issues pertaining to causation. It is clear or at least implicit from the SAR's grounds of decision (referred to in the later part of this judgment) that the SAR did not take into account the allegations relating to causation that was raised by D2 and D3. In my view, once liability has been established, then it is impermissible for D2 and D3 to re-open the causation issue during the hearing of assessment of damages. As such, the SAR cannot be faulted for ignoring the issue of causation which had been subsumed in the decision on liability.

THE PARTICULARS OF NEGLIGENCE

[28] I will now set out the plaintiff's claim for negligence/nuisance, which is based on the specific allegations that were made in the statement of claim.

[29] In para 13 of the statement of claim, the plaintiff had set out the 'Particulars of Negligence'. They are as follows:

BUTIR-BUTIR KECUAIAN

13. Defendan-defendan, pekerja-pekerja dan/atau pengkhidmat-pengkhidmat dan/atau ejen-ejen mereka adalah cuai iaitu bahawa mereka telah:

a) Menyebabkan atau membenarkan getaran (vibration) timbul daripada kerja-kerja pembinaan tersebut, dan gagal mengambil sebarang langkah-langkah pencegahan atau langkah-langkah pencegahan yang secukupnya terhadap berlakunya getaran tersebut;

b) Menyebabkan atau membenarkan pergerakan dan/atau hakisan dan/atau mendapan dan/atau kemerosotan tanah berlaku, dan gagal mengambil langkah-langkah pencegahan yang secukupnya terhadap berlakunya pergerakan dan/atau hakisan dan/atau mendapan dan/atau kemerosotan tanah tersebut di atas Hartanah Plaintif;

A

c) Gagal untuk menggunakan atau mengarahkan penggunaan cara-cara penggalian dan pemantakkan cerucuk yang dapat mengelakkan kerosakan berlaku kepada Hartanah Plaintif;

d) Gagal untuk menyiasat secara menyeluruh kausa/punca berlakunya pergerakan tanah dan mendapan tanah yang menyebabkan keretakan-keretakan dan kerosakan kerosakan kepada Hartanah Plaintif dan juga gagal untuk mengambil sebarang langkah-langkah pencegahan atau langkah-langkah pencegahan yang secukupnya untuk mengatasi punca berlakunya masalah tersebut;

B

C

e) Gagal untuk mengambil tindak balas dan/atau tindak balas secukupnya terhadap aduan Plaintif berkenaan kerja-kerja pembinaan yang dijalankan, khasnya risiko kepada Hartanah Plaintif sekiranya 'sheetpile' diekstrak;

f) Gagal untuk memberikan 'method statements' berkenaan cara pengekstrakan sheetpile walaupun telah dipersetujui sebelum daripada itu bahawa sheetpile tidak akan diekstrak tanpa diadakan terdahulu satu pengekstrakan percubaan sheetpile ('trial extraction') mengikut prosedur yang dipersetujui oleh kedua-dua pihak;

D

E

g) Terus cuba untuk mengekstrak baki 'sheet pile' tanpa mempedulikan efek pengekstrakan kepada Hartanah Plaintif walaupun Defendan-defendan telah diberitahu berkenaan risiko keretakan-keretakan dan kerosakan-kerosakan tambahan kepada banglo-banglo di Hartanah Plaintif akibat daripada getaran ('vibration') timbul daripada, dan/atau pergerakan tanah yang hebat disebabkan oleh tindakan Defendan Kedua dan Defendan Ketiga mengekstrak 'sheet pile';

F

h) Gagal di dalam premis tersebut untuk mengambil sebarang langkah-langkah jaga atau langkah-langkah jaga yang munasabah untuk keselamatan Hartanah Plaintif;

G

i) Dengan cuainya membenarkan dan/atau melakukan aktiviti-aktiviti di Hartanah-hartanah tersebut tanpa menghiraukan kerosakan-kerosakan dan/atau efek negative terhadap Hartanah Plaintif;

[30] It is clear from a perusal of the statement of claim that there are no particulars of special damages nor is there any prayer for special damages. There is also no prayer nor any special facts or particulars for aggravated and/or exemplary damages.

H

RELIEF SOUGHT

I

[31] We may now examine the reliefs that were sought in the statement of claim. They are as follows:

19. Oleh yang demikian, Plaintif menuntut terhadap Defendan-defendan seperti berikut:

a) Satu injunksi berkekalan (perpetual injunction) untuk menghalang Defendan-Defendan sama ada melalui ejen dan/atau pekerja dan/atau pengkhidmatan dan/atau cara lain daripada mengeluarkan 'sheet pile' yang ditanam di Hartanah-Hartanah Tersebut yang bersempadan dengan Hartanah Plaintif;

b) Satu perintah bahawa jika Defendan-Defendan samada melalui ejen dan/atau pekerja dan/atau pengkhidmat dan/atau cara lain ingkar Perintah Mahkamah Yang Mulia ini untuk perenggan (a), maka mereka akan dihukum penjara kerana menghina Mahkamah Yang Mulia ini;

c) gantirugi untuk ditaksirkan di perbicaraan kelak;

d) kos, dan

e) lain-lain perintah yang pada pendapat Mahkamah Yang Mulia ini sesuai, patut dan adil.

[32] The trial of the action was heard by the Honourable Judicial Commissioner Puan Rosilah bt Yop JC (as she then was) who dealt with the issue of liability only. She delivered her judgment on 29 July 2011 wherein she found the defendants to be liable for negligence and private nuisance. She ordered that damages be assessed by the registrar ('the High Court decision'). D2 and D3 appealed to the Court of Appeal against the High Court decision. The appeal against the High Court decision was recently dismissed by the Court of Appeal.

[33] I should also mention that D3 had added MUI Continental Insurance Bhd as a third party to the present suit and sought to obtain a declaration that pursuant to a contractors all risks policy which had been issued by the third party, they are entitled to be indemnified by the third party for any claims that are made against them as a result of damage done by D3 to the plaintiff's property.

[34] The claim for a declaration as to the third party's liability to indemnify D3 was allowed by the learned judicial commissioner. The third party appealed to the Court of Appeal against that decision, but the appeal was dismissed on 30 July 2015. During the hearing of the present appeals before me, the third party did not actively participate but their counsel was present when the arguments were presented on the last date when I sought clarification and delivered judgment in respect of encls 82 and 83.

[35] I have mentioned the role of the third party only for purposes of completeness and to explain the presence of counsel for the third party on the date when the decision was delivered. I should add that the liability of the third party vis a vis D3 under the contractors all risks policy has no relevance to the issues relating to the appeals before me. But it follows that any reduction or

diminution in the monetary award that was made in favour of the plaintiff would correspondingly reduce the third party's financial exposure to D3.

GROUNDS OF JUDGMENT (LIABILITY)

[36] I now turn to the learned judicial commissioner's grounds of judgment on liability. The verbatim grounds of judgment on liability are as follows:

> Perbicaraan ini adalah atas isu liability sahaja dan ganti rugi untuk ditaksikan di hadapan pendaftar.
>
> Penghakiman ke sini adalah berdasarkan isu-isu untuk dibicarakan yang dipersetujui oleh kedua-dua pihak.
>
> Setelah mendengar kes plaintif dan defendan-defendan dan hujahan-hujahan dari kedua-dua pihak serta menimbangkan keseluruhan kes mahkamah dapati seperti berikut:
>
> i. Dari keterangan yang dikemukakan, mahkamah dapati bahawa hartanah plaintif adalah dalam keadaan baik dan keretakan-keretakan yang muncul pada hartanah plaintif sebelum defendan-defendan memulakan kerja-kerja pembinaan ditapak pembinaan mereka adalah kerosakan biasa untuk binaan yang berusia dalam tempoh masa 15–20 tahun.
>
> ii. Selepas defendan-defendan memulakan kerja-kerja pembinaan ditapak bersebelahan hartanah plaintif (yang dipertikaikan), hartanah plaintif telah selanjutnya mengalami kerosakan-kerosakan teruk seperti kehilangan sokongan secara asli hartanah plaintif, keretakan-keretakan yang menjadi rekahan-rekahan dan kerosakan-kerosakan, kerugian separa kefungsian bangunan dan pelemahan struktur bangunan. Kerosakan-kerosakan teruk ini, mahkamah dapati adalah diakibatkan oleh kerja-kerja pembinaan yang telah dijalankan oleh defendan-defendan.
>
> iii. Dari keterangan-keterangan yang dikemukakan mahkamah juga dapati bahawa akibat dari kerja-kerja pembinaan tersebut telah menyebabkan kacau ganggu (*private nuisance*) kepada plaintif.
>
> iv. Mahkamah dapati defendan-defendan mempunyai tugas berhati-hati terhadap plaintif dan setelah mahkamah meneliti dan menimbangkan keseluruhan keterangan yang dikemukakan, mahkamah dapati atas imbangan kebarangkalian defendan-defendan telah melanggar tugas berhati-hati mereka terhadap plaintif.
>
> v. Atas sebab itu plaintif telah hadapi kerosakan dan kerugian dan perlu digantirugikan oleh defendan-defendan.
>
> vi. Mengikut pliding plaintif, plaintif juga memohon untuk satu injunksi berkekalan agar defendan-defendan atau pekerja-pekerja, pengkhidmat atau ejennya agar tidak mengeluarkan 'sheet pile' yang dihartanah tersebut yang bersempadanan dengan hartanah plaintif. Dari keterangan yang dikemukakan, tidak ada keterangan yang mencukupi untuk mahkamah pertimbangkan untuk injunksi berkekalan.

vii. Berdasarkan keseluruhan keterangan yang dikemukakan dan menimbangkan hujah dari kedua-dua pihak serta menimbangkan keseluruhan kes dan merujuk pada alasan-alasan diatas, mahkamah dapati atas imbangan kebarangkalian plaintif telah berjaya membuktikan kesnya terhadap defendan-defendan, maka dengan itu mahkamah perintahkan seperti berikut:

Perenggan 19 Pernyata Tuntutan Plaintif, bagi prayer (c), dan (d) diluluskan. Bagi prayer (c) untuk ditaksirkan dihadapan Pendaftar. Prayer (d) untuk ditaksirkan melainkan dipersetujui. Lain-lain prayer tidak diluluskan.

ASSESSMENT OF DAMAGES

[37] After the High Court decision, the matter came up for assessment of damages before the SAR. The SAR directed that the assessment of damages be conducted by way of a trial. The trial for assessment of damages was held from 5–8 February 2013 and continued on 21 February 2013.

EVIDENCE TENDERED AT THE ASSESSMENT OF DAMAGES

[38] During the assessment of damages before the SAR, the plaintiff called seven witnesses; the full particulars of which are as follows:

Witness	Name – Designation	Evidence (witness statements)
PW1	Ng Ling Li – director of the plaintiff's company	P1
PW2	Choong Pek Kem – Test Sdn Bhd	P3
PW3	Anthony Lee Tee – architect from the Architect Centre	P4
PW4	Ng Shou Guan – quantity surveyor from ELP Juruukur Bahan Sdn Bhd	P5
PW5	Marcus Tan Cheng Tat – contractor from Conspec Builders (M) Sdn Bhd	P6
PW6	Wee Soon Teck – Test Technical Laboratories Sdn Bhd	P7
PW7	Nithiaraj a/l Ramanathan – engineer from Zaidun Leeng Sdn Bhd	P8

[39] D2 and D3 called two witnesses; the full particulars of which are as follows:

Witness	Name	Evidence (witness statements)
DW1	Tang Ching Chang @ Tan Chin Chang	D1
DW2	Tan Khai Loon	D2

[40] The breakdown of costs incurred by the plaintiff is as follows:

Costs incurred	Amount
Engineering and court attendance: (exh P2F)	RM124,554.15
Costs of monitoring reports (exh P2G) (Test Technical Laboratory Sdn Bhd)	RM10,600
Survey report and court attendance (Test Sdn Bhd) (exh P2H(a)–(d))	RM20,625
Consultancy fees – Architect Centre report P2A Billings/receipts P21	RM23,500
Consultancy fee – Lee Tee Architect (Billings and receipts – exh P2J)	RM1077.50
Consultancy fees – ELP Juruukur Bahan Sdn Bhd (Billings/receipts – exh P2K)	RM21,200
Court attendance for PW2, PW3, PW4, PW5, PW7	RM10,100
Total	RM211,656.65

[41] The breakdown for rectification costs is as follows:

Rectification incurred	Amount
Engineering fees (exh P2L)	RM21,624
Architect fees	RM44,096
Clerk of works	RM36,000
Rectification costtender document (exh P20)	RM375,460
Alternative accommodation	RM113,796
Storage cost	RM63,137
Total	RM654,113

[42] The parties filed a 'Common Bundle of Documents' which was marked as 'P2'. On 22 April 2013, the SAR ordered the defendants to jointly pay to the plaintiff the following sums:

Description of item	Amount
Costs incurred	RM211,656.65
Rectification costs and related costs	RM654,113
General damages	RM150,000
Aggravated and/or exemplary damages	RM100,000
Total	RM1,115,769.65

The SAR also ordered interest at a rate of 4%pa on the sum of RM1,115,769.65 from 22 April 2013 until full settlement and that the sum of RM1,115,769.65 be borne by all the defendants jointly; and that there be no orders as to costs.

[43] The SAR's (verbatim) grounds of judgment on quantum are as follows:

A. Costs incurred to-date RM211,656.65:

Based on the evidence tendered before me, I have decided that the plaintiff is entitled to claim the amount of RM211,656.65 being actual cost incurred by the plaintiff to date as a result of the defendant's negligence. The reason being as follows:

i. Engineering and court attendance fees (Zaidun Leeng Sdn Bhd RM124,554.15).

PW1 has testified that the plaintiff had engaged the services of Zaidun Leeng Sdn Bhd to advise the plaintiff on the damage to its property. The billing from Zaidun Leeng Sdn Bhd is marked as exh P2F and the total amount is RM124,554.15. The court has satisfied with the evidence given by the PW1. Zaidun Leeng Sdn Bhd's appointment was from early 2005 and continuing. DW1 also admitted that he was aware about the appointment. The plaintiff called PW7 who was the engineer from Zaidun Leeng Sdn Bhd and appeared as the expert witness. PW7 has testified on the Zaidun Leeng Sdn Bhd's involvement as the plaintiff's engineering consultants in monitoring and assessing the damage caused to the plaintiff's property by the defendants.

The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount. The plaintiff has successfully proved it as the actual cost incurred by the plaintiff as to-date.

ii. Cost of monitoring reports (Test Technical Laboratory Sdn Bhd) RM10,600.

PW1 has testified that Test Technical Laboratory Sdn Bhd was initially appointed by the defendants to monitor the plaintiff's property. The plaintiff then appointed them to continue monitoring the property around December 2005. DW1 admitted that he was aware about this.

PW6 is the witness who appeared from Test Technical Laboratory Sdn Bhd and he has explained the works carried out by him.

The plaintiff has tendered the evidence of the billings of the amount RM10,600 and was marked as exh P2G.

The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount. The plaintiff has successfully proved it as the actual cost by the plaintiff as to-date.

iii. Cost of survey report and court attendance fees (Test Sdn Bhd) RM20,625.

PW1 has testified that Test Sdn Bhd was appointed by the plaintiff sometime around September 2005 to advise them on matters related to the distress suffered by the plaintiff's property.

PW2 is the witness who appeared from Test Sdn Bhd has testified that his scope of work was to conduct a condition survey, map out the cracks, conduct dimensional survey and carry out precise level measurements on the floor to determine its levelness.

The plaintiff has tendered the evidence of the billings and receipts of the amount RM20,625 and was marked as exh P2H(a)–(d).

The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount. The plaintiff has successfully proved it as the actual cost incurred by the plaintiff as to-date.

iv. Consultancy fees for Architect Centre RM23,500.

PW1 has testified that the plaintiff appointed Architect Centre to advise on the remedial works that needed to be carried out to rectify to the damage to the property. PW3 was the architect appointed by the Architect Centre to inspect the property and come up with the recommendations for the remedial works that needed to be carried out.

PW3 also has testified that after receiving the instructions from the Architect Centre, he went to the plaintiff's property to carry out an inspection of the damage and determine the remedial action required. The report prepared by PW3 has marked as exh P2A.

The plaintiff has tendered the evidence of the billings and receipts of the amount RM23,500 and was marked as exh P2I. The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount.

The plaintiff has successfully proved it as the actual cost incurred by the plaintiff as to date.

v. Consultancy fees for Lee Tee Architect RM1,077.70.

PW1 has testified that the plaintiff appointed PW3 to assist in the contract documentation and co-ordination for purposes of calling tenders. PW3 had provided this service under his own firm Lee Tee Architect.

PW3 also confirmed that the tender documents were prepared based on his report. The plaintiff has tendered the evidence of the billings and receipts of the amount RM1,077.50 and was marked as exh P2J.

The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount. The plaintiff has successfully proved it as the actual cost incurred by the plaintiff as to-date.

vi. Consultancy fees for ELP Juruukur RM21,200 PW1 has testified that on the advice of PW3, the plaintiff appointed ELP Juruukur Bahan Sdn Bhd to carry out a tender exercise on the plaintiff's behalf.

PW4 who was from ELP Juruukur Bahan Sdn Bhd has testified that he prepared the tender documents based on PW3's building assessment report and in consultation with PW3. He then sent out invitations for three contractors to bid for the remedial works.

PW4 confirmed that the lowest bid was by Conspec Builders (M) Sdn Bhd and he recommended that the plaintiff accept this bid.

The plaintiff has tendered the evidence of the billings and receipts of the amount RM21,200 and was marked as exh P2K.

The court took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount. The plaintiff had successfully proved it as the actual cost incurred by the plaintiff as to-date.

vii. Court attendance charges for PW2, PW3, PW4, PW5 and PW7 for RM10,100.

All the witnesses PW2, PW3, PW4, PW5, PW7 has testified that they had charged the plaintiff for the attendance to court and the plaintiff has paid the sum to them.

The court applied the principle laid down in the case of *Eu Sim Chuan v Kris Angsana Sdn Bhd* [2007] 7 CLJ 89 which was after ruling that the defendants was liable for negligence, the High Court found such claims for expert and consultation fees to be legitimate.

B. RECTIFICATION COST AND RELATED COST RM654,113

i. Engineering fees RM21,624.

PW7 has testified that the amount estimate of RM21,624 was for advise and supervision of the rectification works (exh P2L; quotation for the said amount is referred). The court hereby took consideration on the fact that the defendants have not adduced any evidence to challenge the said amount.

ii. Architect's fees RM44,096.

PW1 has testified that the plaintiff had decided to appoint Masyerin MN Architect to manage the rectification works and their project management fees are RM44,096.

PW3 has confirmed that these fees are in accordance with the minimum scale fees stipulated by Lembaga Arkitek Malaysia. The defendants have not adduced any evidence to challenge the said amount.

iii. Clerk of works RM36,000.

PW1 has testified that the plaintiff had decided to appoint Gordon Lee as their clerk of works and his services for six months cost RM36,000. PW4 confirmed that the average rate for a clerk of works is about RM5,000–RM6,000 per month. The court hereby found that the amount of RM36,000 for six months is reasonable. The defendants have not adduced any evidence to challenge the said amount.

iv. Rectification cost RM375,460.

PW5 has testified that when his company receive the tender invitation, he took a site visit to the plaintiff's property to view the actual damage and rectification works required according to the bill of quantities before determining his cost and finally submitted his tender bid for RM375,460. The tender has been marked as exh P20.

During the trial, the defendants has challenge the said amount through DW2 but the court hereby took consideration the fact that DW2 has admitted during cross-examination that he has never conducted a site visit to the plaintiff's property compared to what PW5 has did.

DW2 also admitted that he has only knew the scope of works for repairs through the plaintiff's consultants' reports, photos and bill of quantities in the tender documents.

v. Alternative accommodation RM113,796 and storage cost RM63,137.

PW1 has testified that the occupants need to move out from the property when the rectification work was being carried out as the contractor has indicated that they would not do the works if there were occupants on the premises. PW1 has proposed accommodation at Micasa All Suit Hotel for six months. The quotation has been marked as ID2P. The furniture of the occupants of the property need to be packed and stored during the rectification works. The quotation has been marked as ID2Q. The defendants have not adduced any evidence to challenge the said amount.

C. GENERAL DAMAGE

The court hereby took into account the hardship suffered by the plaintiff in dealing with the problem of the damages. Based on the cases law submitted by the plaintiff, the court has granted the amount of RM150,000 being a fair and reasonable sum to be awarded as general damages to the plaintiff.

D. AGGRAVATED DAMAGES AND/OR EXEMPLARY DAMAGES

In the House of Lords case of *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 at p 1006 Lord Neuberger of Abbotsbury observed:

> Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way of circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant.

Based on the cases law submitted by the plaintiff, the court has granted the amount of RM100,000 as a fair and reasonable sum to be awarded as aggravated and/or exemplary damages to the plaintiff.

No order as to cost for this application.

SPECIAL DAMAGES – FAILURE TO PLEAD

[44] Before I deal with the topic of special damages and the failure to plead the specific items that were claimed as special damages, I should first address the objection that was taken by counsel for the plaintiff in relation to this point.

[45] Counsel for the plaintiff maintained that there was no objection taken by counsel for D2 and D3 when evidence was led on special damages during the hearing of assessment of damages before the SAR. As such, it was contended that the objection has been waived and D2 and D3 are precluded from raising this point during the appeal before me. In this regard, counsel for D2 and D3 did not repudiate the assertion by counsel for the plaintiff who said that no objection was taken during hearing of assessment of damages before the SAR on the plaintiff's failure to plead special damages.

[46] Before me, counsel for D2 and D3, Mr K Ramesh in fact candidly conceded that no objection was taken by D2 and D3 during the hearing of assessment of damages before the SAR in respect of the plaintiff's failure to plead special damages. He said however that he did raise objection as regards the absence of pleadings for aggravated and exemplary damages which is a different matter altogether. As for absence of pleadings on special damages counsel for D2 and D3 said that whilst the objection was not raised, it had not been waived and that his clients are in any event not precluded from raising the objection during the appeal before me as the appeal is by way of re-hearing.

[47] He cited the case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (Edgar Joseph Jr FCJ) in support of the proposition that the judge hearing an appeal from the decision of the SAR is not confined to points that were taken before the SAR and that new points may be raised and the judge must consider those new points. The principle in this regard is to be distilled from the following passage of the judgment of the Federal Court where Edgar Joseph Jr FCJ said at p 37:

> With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. *The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply*. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v Rimmer* [1971] 1 All ER 1072 at p 1076; [1971] 1 WLR 123 at p 127:
>
> > I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was

> contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him – that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it had come before me for the first time, and, moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority for this proposition can be found in the speech of Lord Atkin in *Evans v Bartlam* and in the notes in The Supreme Court Practice 1970 at p 759 para 58/1/2, p 762 para 58/4/1, under RSC O 58 rr 1 and 4.
>
> In *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 106, Edgar Joseph Jr SCJ, when speaking for the Supreme Court, had occasion to refer to the above passage in the judgment of Payne J with approval. The judge was therefore wrong in refusing to consider the contention of the appellant that the default judgment was invalid. We must therefore direct our attention to this contention (see p 37 of the judgment). (Emphasis added.)

[48] I agree with the submissions made on behalf of D2 and D3. In an appeal before the judge in chambers, the court is not confined only to the points that were raised before the registrar and if new points are raised, the court must consider the new points that are raised during the appeal under O 56 r 1 of the Rules of Court 2012 (previously O 56 r 1 of the Rules of the High Court 1980).

[49] Of course, if the new point is such that it requires fresh evidence to be considered then the party seeking to raise the new point will have to adduce fresh evidence, provided of course he can overcome the hurdle placed by way of O 56 r 1(3A) of the Rules of Court 2012 which is the statutory codification of the rule in *Ladd v Marshall* [1954] 3 All ER 745 (see *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6 (CA)).

[50] For completeness, I have reproduced O 56 r 1(3A) of the Rules of Court 2012 which provides as follows:

> At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that –
>
> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

[51] However, in the present appeals before me, there is no necessity for any fresh evidence. Thus, there is no evidential hurdle to the new point being

considered at this stage. All the materials are already before the court and the point that has been taken is purely on pleadings and is eminently suitable to be considered by this court without the need for any fresh or further evidence.

[52] In fact, I would go so far as to say that this is not a point that is fact sensitive and essentially involves a pure question of law and is of general application. The question of law here is whether special damages must be pleaded and whether in an appeal to the Judge in chambers under O 56 r 1 of the Rules of Court 2012, the defendants are precluded from raising the point relating to the plaintiff's failure to plead special damages in circumstances where no objection was taken on inadequacy or absence of pleadings during the hearing of the assessment of damages before the SAR.

[53] In the present case, it is imperative to note that the costs incurred/rectification costs were clearly items that would ordinarily be claimed as special damages. Counsel for the plaintiff conceded that these were special damages. However, she took what I thought was a heretical position that it was not absolutely necessary for special damages to be expressly pleaded in the statement of claim.

[54] Counsel for the plaintiff submitted that so long as the items that were being claimed as special damages were presented by way of witness statements and proven by way of oral and documentary evidence, then the claim should be allowed, regardless of whether it was pleaded in the statement of claim.

WHETHER SPECIAL DAMAGES MUST BE PLEADED

[55] The starting point is of course, O 18 r 12(1) and (2) of the Rules of Court 2012 and its predecessor O 18 r 12(1) and (2) of the Rules of the High Court 1980. The cumulative effect of O 18 r 12(1) and (2) of the Rules of Court 2012 is that all relevant particulars in relation to special damages have to be pleaded.

[56] The relevant rules provide as follows:

> Particulars of pleading (O 18 r 12)
>
> 12(1) Subject to paragraph (2), *every pleading shall contain the necessary particulars of any claim*, defence or other matter pleaded including, without prejudice to the generality of the foregoing words –
>
> > (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

A

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

...

B

(2) *Where it is necessary to give particulars of debt, expenses or damages* and those particulars exceed three folios, they shall be out in a separate document referred to in the pleading and *the pleading shall state whether the document has already been served and, of so, when, or is to be served with the pleading.* (Emphasis added.)

C

[57] Apart from the Rules of Court 2012 (and its predecessor the Rules of the High Court 1980), the requirement for specialdamages to be specifically pleaded has been part of the common law and is also firmly entrenched as part of Malaysian adjectival jurisprudence. The following cases lucidly demonstrate
D the principle relating to pleadings and the consequences that will follow if there is any omission in the pleadings.

[58] The starting point is the seminal case of *Ilkiw v Samuels and Others* [1963] 2 All ER 879 (CA), where Diplock LJ said:

E

As regards the question of damages, I would put it in this way. *Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised.* In this case special damages were so pleaded and particularised at the sum of [a3]77 odd. Shortly before the trial, the special damage (as so particularised) was agreed at [a3]77 by letter.

F

In my view, it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years - that one can recover in an action only special damage which has been pleaded, and, of course, proved. (Emphasis added.)

G

[59] In *Charlesworth and Percy on Negligence* (12th Ed), the learned authors have restated the trite proposition; special damages must be pleaded and full particulars must be given. They say at para 5-58 at p 362:

H

Special damages. Special damage, in this context, means some specific item of loss, which the claimant alleges to be the result of the defendant's negligence in the case, although it is not presumed by law to have flowed from it, as a matter of course.

If a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant
I the case he has to meet and assisting him in computing a payment into court.

Accordingly, the claimant must plead any item of damage, which represents out-of-pocket expenses incurred or earnings lost before the trial, since, probably, they are capable of an exact calculation.

Such damage is commonly referred to as special damage or special damage but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded.

Full particulars of all special damage must be given and, if not given, will be ordered. *This obligation to give particulars arises not because the nature of the loss is necessarily unusual but because the claimant, who has been able to base his claim upon a precise calculation, ought to give the defendant access to those facts which have made that calculation possible.* Clearly, by way of further example, an allegation of loss of profits is a claim of special damage and must be specifically pleaded, it being wholly insufficient in this connection merely to claim 'damages'.

[60] In *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (FC), the Federal Court applied the principle that was established by *Ilkiw v Samuels and Others* and said:

It is to be observed that the law in regard to a claim for special damages is clear law in that it must not only be pleaded but proved. Diplock LJ (as he then was) in *Ilkiw v Samuels and Others* [1963] 2 All ER 879 at p 890 clearly expressed the view that: '... it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law over the last hundred years – that *one can recover in an action only special damage which has been pleaded, and, of course, proved*. (Emphasis added.)

[61] In *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354; [2010] 1 LNS 980 (*Cheong Fatt Tze*'s case), the facts were somewhat similar to the present case and in that case also the plaintiff was seeking, inter alia, special damages for the cost and expenses incurred as a result of damage done to the plaintiff's property as a consequence of the constructions (piling) work that was carried out by the defendants on the adjacent property. In that case, the issue arose as to whether special damages can be allowed. The statement of claim was initially devoid of a pleading on special damages, but later it was amended (by consent) and special damages was expressly pleaded.

[62] Thus, the court had no difficulty in rejecting the complaint that was advanced by the defendant. In rejecting the objection which taken by the defendants in respect of inadequacy of pleadings on special damages, the learned judicial commissioner, Chew Soo Ho JC said:

The defendant contended that *special damages must be pleaded and that Plaintiff had failed to so plead them.* Hence the plaintiff is not entitled to these claims. *However, from the amended statement of claim which had been amended with the consent of all parties, all these special damages have in fact been duly pleaded vide the amendments. There should not be any cause for complaint, since the defendant had conceded to the amendments by the plaintiff.* The authority of *Real Marble Works Sdn Bhd v Teh Khoon Chuan Trading Sdn Bhd & Ors* [1999] 6 MLJ 140; [1999] 7 CLJ 182; [1999] 3 AMR 3393 where particulars of special damages were not pleaded

and hence the claim in reality became a claim for general unliquidated damages which must be proved, as submitted by the defendant, is therefore not applicable. (Emphasis added.)

[63] Similarly, in *Pal Associates Sdn Bhd v The Syndicate of the Press of the University of Cambridge being authorised by the Chancellor Masters and Scholars of the University of Cambridge* [2014] 10 MLJ 728 the court emphasised the need for special damages to be pleaded and particulars to be provided, failing which it cannot be recovered in the action. In that case, the learned judicial commissioner, Dato' Asmabi bt Mohamad (as she then was) examined some of the well known cases on this point and said:

> [19] Further the plaintiff's pleadings were not carefully drafted, in that, *there was omission on the part of the plaintiff to specifically plead for special damages to be awarded by the court giving the particulars of these special damages. The plaintiff could not cover the defects in its pleadings by way of affidavit evidence. It is trite that the plaintiff who is claiming for special damages must specifically plead and provide the particulars of the same in his pleadings.* In *Ilkiw v Samuels & Ors* [1963] 1 WLR 991; [1963] 2 All ER 879 Diplock LJ said '... In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it being the law for the last hundred years – that one can recover in an action only special damage which has been pleaded, and, of course proved'.
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> [20] In *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 the Federal Court held that:
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> > It is a well established principle that special damages in contrast to general damages, *have to be specifically pleaded* and proved. They are recoverable only where they can be included in the proper measure of damages are not too remote (see *Halsbury's Laws of England* (4th Ed, Vol 11) p 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country.
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> > The same principle was adopted by Ong Hock Thye FJ (as he then was) in *Yee Hup Transport & Co and Anor v Wong Kong* [1967] 2 MLJ 93 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer LJ in *Ilkiw v Samuels & Ors* [1963] 1 WLR 991; [1963] 2 All ER 879 he held that general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat FJ (as he then was) in *Murtadza bin Mohamed Hassan v Chong Swee Plan* [1980] 1 MLJ 216 applied the principle in *Ilkiw v Samuels & Ors* that special damages if pleaded as in that case could be recovered.
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> [21] *Mayne and MacGregor on Damages* (12th Ed), para 970 was also quoted in *Ong Ah Long v Dr S Underwood* as follows:
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> > Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific

amount of claim, which he will be confronted with at the trial. (Emphasis added.)

[64] In *Yeah Eh Farn v Alliance Bank (M) Bhd* [2014] 3 CLJ 803; [2013] 1 LNS 829 (HC), the learned judicial commissioner, Komathy Suppiah JC had occasion to examine this very same point and concluded that if special damages are not pleaded, then evidence in respect of those items cannot be led. Her lucid analysis is seen from the following passages of her judgment:

ISSUE

13. The singular issue for consideration is whether the eight heads of special damages claimed by the plaintiff were recoverable?

THE LAW

14. The law on the subject of general and special damages is well settled in Malaysia. Two authorities illustrate this point clearly. In *MGG Pillai v Tan Sri Vincent Tan* [1995] 2 MLJ 493 the Court of Appeal observed:

> Counsel for the respondent, in answer to the submission made on behalf of the appellants, relied on the following passage from *Lachman v Pyarchand* AIR 1959 Raj 169, at p 175 which, in my view correctly states the law:
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> > In the second place, the learned civil judge seems to have thought that the plaintiff had failed to prove the damages claimed by him and therefore he was not entitled to claim any. Now, so far as this aspect of the case goes, I desire to say, first that damages are of two kinds: general and special, and the learned civil judge does not appear to have appreciated the distinction between them, and second, that while special damages are required to be specifically pleaded and proved general damages are not.
> >
> > General damages are damages which the law presumes to flow from, and as if it were the natural and probable consequence of the defendants' act. Therefore general damages need not be pleaded specifically nor need any evidence be produced to prove them as such. I have no doubt that having regard to the pleadings of the plaintiff in the present case, what he really claimed for was general and not special damages.

[15] In *Ong Ah Long v Dr S Underwood*, the case cited by the defendant, Syed Agil Barakbah FJ in delivering the judgment of the Federal Court summed up the law comprehensively as follows:

> It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote (see *Halsbury's Laws of England* (4th Ed, Vol 11) p 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye FJ (as he then was) in *Yee Hup Transport & Co and Anor v Wong Kong* [1967] 2 MLJ 93 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer LJ in *Ilkiw v Samuels & Ors* [1963] 1 WLR 991; [1963]

2 All ER 879 he held that the general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat FJ (as he then was) in *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216 applied the principle in *Ilkiw v Samuels & Ors* that special damages if pleaded as in that case could be recovered. The principle was also adopted by Mohamed Azmi J (as he then was) in *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 in the Federal Court.

The reason that special damages have to be specifically pleaded is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial (per Edmund Davies, LJ in *Domsalla v Barr* [1969] 1 WLR 630 at p 635. In special damages claims the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy (*McGregor on Damages* (14th Ed) p 1012 para 1498). The purpose is to put the defendants on their guard and tell them what they have to meet when the case comes on trial (per Cotton LJ in *Phillips v Phillips* (1878) 4 QBD 127 at p 139.

And, continued at p 329:

Be that as it may, we prefer the view that in practice special damages have to be specifically pleaded having regard to prevalent authorities. It requires the plaintiff to plead and particularise any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial, and which is capable of substantially the exact calculation. It is commonly referred to as special damages in the sense that fairness to the defendant requires it to be pleaded. (Per Lord Donovan in *Perestrello E Companhia Limitada v United Paint Co Ltd* and per Lord Goddard in *British Transport Commission v Gourley* [1967] 2 MLJ 93. The obligation to particularise is stated in Mayne and McGregor on *Damages* (12th Ed) para 970:

> Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.

As stated by Diplock, LJ in *Ilkiw v Samuels & Ors* on p 1006:

> ... In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last one hundred years – that you can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like [a3]2,000 – at any rate, a very much larger sum than [a3]77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at, at the sum of [a3]77 for special damage. The evidence about the loss of earnings in excess of [a3]77 was admissible, not

as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be.

[16] The principle that emerges clearly from these authorities is that special damages must be specifically pleaded and proved in order to be recoverable. The rationale for this requirement is to ensure that a defendant is not taken by surprise at the trial and would know what is the case he has to meet at the trial. Thus, a plaintiff is disentitled from adducing evidence in support of special damages where the same has not been pleaded.

ANALYSIS

[17] It is common ground that the eight heads of claims made by the plaintiff were items of special damage and not general damages as concluded by the registrar. I agree with the defendants that the eight heads of claims made by the plaintiffs, being special damages need to be the subject of an express pleading based on the principles stated in the authorities discussed above.

In the absence of any reference to these eight items in the statement of claim, evidence of the same cannot be led and these are irrecoverable. (Emphasis added.)

[65] In *John Andrew Malthouse v Cyril Steven & Ors* [2015] 7 MLJ 548 the plaintiff was the victim of a wrongful shooting by the first defendant who was an auxiliary policeman. As a result of the shooting, the plaintiff sustained serious brain injury and underwent major surgery and hospitalisation. During the hearing of assessment of damages before the registrar, the plaintiff produced receipts for expenses amounting to RM14,311.66. But these were not allowed by the registrar. On appeal the learned judge, Ravinthran Paramaguru J rejected the claim for RM14,311.66, which was not pleaded, albeit that the documents to support the claim were tendered. The relevant passage from that case reads as follows:

CLAIM FOR SPECIAL DAMAGES OF RM14,311.66

[33] In para 2 of the judgment dated 8 March 2001, the court granted special damages under para 12 of the amended statement of claim in the sum of RM149,423.35. However, during the assessment hearing, the plaintiff claimed a further RM14,311.66 which were incurred as medical expenses after 8 March 2001. The *receipts to support these expenses were produced by the plaintiff*. However, the learned deputy registrar did not make any award under this head of special damages for the reason that it had already been 'settled'. He made this statement because the special damages award in the sum of RM149,423.35 in the judgment dated 8 March 2001 had already been paid to the plaintiff.

The learned senior federal counsel submitted that *special damages in the sum of RM14,311.66 cannot be awarded because they do not fall under prayers (2) and (4) of the judgment dated 8 March 2001. He further submitted that special damages must be pleaded and particularised in the pleadings. Prayers (2) and (4) in the said order refer to the special damages that were pleaded under para 12 in the sum of RM149,423.35. These special damages were granted by the court and were fully paid*. In my view, there is merit in the argument of the senior federal counsel. It is trite law that *special*

A *damages must be particularised and pleaded.* In the instant case, assessment of damages was only ordered in respect of general damages. I shall therefore dismiss the appeal of the plaintiff in respect of the decision of the deputy registrar not to grant further special damages of RM14,311.66.

(Emphasis added.)

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[66] Counsel for the plaintiff in the present case took the view that there must be some measure of flexibility when it comes to pleadings on special damages and so long as the other side were not taken by surprise and were not C prejudiced, the items of cost and expenses which were set out in the witness statements and which had been proved before the SAR should be allowed.

[67] She relied on a passage from *McGregor on Damages* (19th Ed) (para 3-008) at p 25 where reference had been made to a decision of the English D Court of Appeal which shows that the court had somewhat relaxed the need for special damages to be expressly pleaded and particularised. In their book, the learned authors appeared to be echoing the views taken by the English Court of Appeal in *Whalley and others v PF Developments Ltd and another* [2013] EWCA Civ 306. The passage from McGregor reads as follows:

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> The reason why these various items of damage have been held to be special for the purpose of pleading, although general for the purpose of liability, would seem to be that where damage has become crystallised and concrete since the wrong, the defendant could be surprised at the trial by the detail of its amount, although it is of a type which he could expect as a consequence of the wrong.

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> ...
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> Accordingly, where in *Whalley v PF Developments* the district judge refused to award damage which technically should have been pleaded, the Court of Appeal reversed since by the time of trial the parties knew exactly what case they were making and meeting and there was no prejudice. And in *Arroyo v Equion Energin Ltd* Stuart-Smith J, while doubting the usefulness of resorting to the terms general damages and special damages when considering whether a pleading amendment was required, took the line that the level of precision required in pleading a particular head of damage should be determined by the need to provide a fair and sufficient indication of the case that was being brought and that the opposing party had to meet.

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[68] I will leave the case of *Whalley* for the moment. In the present case, there was no attempt by the plaintiff to amend the statement of claim prior to the hearing of assessment of damages. Before me, counsel for the plaintiff said that I it was not necessary to plead special damages and in any event, if the other side had raised an objection, then she would have made the necessary application to amend. Thus, she complained that she had been deprived of the opportunity to amend the statement of claim because the other side raised no objections in respect of the lack of pleading on special damages. She said that in any event,

there is no prejudice to D2 and D3 as they knew exactly what was being claimed as these were all stated in the witness statements of the plaintiff's witnesses.

[69] In my view, the plaintiff cannot use the silence or inertia of counsel for D2 and D3 as an excuse for not amending the statement of claim as the rule relating to pleading special damages is a mandatory legal requirement and if the statement of claim is inadequate as is clearly the case in these appeals, then the plaintiff has taken an unnecessary risk in proceeding with the hearing of assessment with absolutely nothing in the statement of claim in relation to special damages. That was a strategic mistake on their part.

[70] The body of case law is clear and unambiguous. The procedural rule relating to pleading special damages is simple but strict. Special damages must be specifically pleaded. If the statement of claim is devoid of any pleading on special damages, then evidence on specials damages cannot be adduced. I cannot over emphasise that the rule is strict in its application. It may have been different if parties had gone on record to state unequivocally that no objection will be taken to the inadequacy of pleadings in respect of special damages. Had that been done, then the other side would be deemed to have 'waived' their right to object, but not otherwise. Here, D2 and D3's silence cannot be equated with consent or be deemed as a waiver.

[71] I should also make mention of the fact that there is no suggestion by the plaintiff's counsel that D2 and D3's counsel had in any way acted improperly or lulled the plaintiff into a false sense of security by not objecting to the evidence being led on special damages. It is obvious enough that before the SAR, the pleading point escaped everyone's attention. For the reasons that I have mentioned earlier, I am of the view that it is patently competent for counsel for D2 and D3 to now raise the issue on appeal before me as the issue is still alive and extant.

[72] It is of course rather unfortunate that the claims for special damages had to be set aside on the pleading point as the SAR's grounds of decision demonstrate quite convincingly that the cost/expenses were proven to the satisfaction of the SAR and I would not have disturbed the SAR's findings on that score. However, the absence of pleadings on special damages in the statement of claim was quite obvious and glaring and it is a matter of surprise that the point was missed all round during the hearing of assessment of damages.

[73] Before I conclude, I should state that the decision of the English Court of Appeal in *Whalley and others v PF Developments Ltd and another* [2013] EWCA Civ 306 where the court allowed the claim for special damages, albeit

not pleaded, is of no assistance to the plaintiff. In that case, the Court of Appeal held that the defendant there was 'not disadvantaged and was able to answer the claimant's case'.

[74] Hence, the claim for special damages was allowed by the English Court of Appeal. It should be borne in mind however, that the English civil procedure rules have undergone a complete transformation/metamorphosis and they are now called the Civil Procedure Rules ('CPR'). In my view, the jurisprudence that emanates from the English Courts arising out of the CPR must be viewed with extreme caution as the CPR is an entirely different procedural regime. In particular, it should be noted that in that case, the English Court of Appeal alluded to the 'flexibility of the modern procedure' under the CPR.

[75] In contrast, the Malaysian adjectival jurisprudence on pleadings in the context of a claim for special damages is relatively inflexible and still follows the strict rule of pleading which was encapsulated in the seminal case of *Ilkiw v Samuels and Others* [1963] 2 All ER 879 at p 890 which Diplock LJ had described in 1963 as 'plain law' which is so trite that:

> everyone has accepted it as being the law over the last hundred years – that one can recover in an action *only special damage which has been pleaded* and of course, proved. (Emphasis added.)

[76] In the result, I was fortified in my conclusion that based on the case law authorities referred to above and the relevant provisions of the Rules of Court 2012, the absence of any pleadings for special damages in the statement of claim is fatal. As such, the award of RM211,656.65 (costs incurred) and RM654,113 (rectification costs) although proved, have to be set aside as these were not pleaded.

AGGRAVATED DAMAGES AND/OR EXEMPLARY DAMAGES

[77] In this case, the statement of claim was clearly bereft of any prayer for aggravated and/or exemplary damages. There were also no particulars or any special facts to support a claim for aggravated and/or exemplary damages. The plaintiff nevertheless made a claim under these two heads of damages when the matter was heard before the SAR.

[78] In mounting a claim for aggravated and exemplary damages, counsel for the plaintiff relied heavily on the case of *Cheong Fatt Tze*. In that case the plaintiff's property was damaged by the defendants construction activities in the adjoining property. The plaintiff claimed aggravated and exemplary damages. In so far as aggravated and exemplary damages are concerned, the learned judicial commissioner Mr Chew Soo Ho JC examined the relevant

substantive principles and procedural requirements for a claim for aggravated and exemplary damages. A

[79] I will first refer to the issue pertaining to aggravated damages which was examined in the *Cheong Fatt Tze*'s case. The discussion on aggravated damages is found in the following passage of the judgment: B

> Aggravated Damages. In the *Law of Tort* (9th Ed, 2009) by Professor John Cooke, the learned author said that aggravated damages 'are awarded where there is outrage to person or property and are best regarded as compensatory. They are to compensate for injury to the claimant's pride or feelings'. In *McGregor on Damages* (15th Ed, 1988) at pp 409–410, aggravated damage is said to be: C
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> > ... extra compensation to the plaintiff for the injury to his feelings and dignity ...
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> In *Ley v Hamilton* [1935] 153 LT 384 at p 386 (HL), Lord Atkin had afforded a good explanation and example of injury to a claimant's feelings and dignity in a case of damages for defamation in the following words: D
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> > (Aggravated damages) are not arrived at ... by determining the 'real' damage, and adding to that sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained that the damages are at large. It is impossible to track the scandal, to know that the quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. E
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> It is clear thus that aggravated damage is awarded as a form of a higher compensation to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case. (*Tort Law* by Catherine Elliot and Frances Quinn (7th Ed, 2009). And such damage is to compensate the plaintiff an extra sum for the injury to his feelings and pride or dignity. In *Rowlands v Chief Constable of Merseyside* [2006] 1 WLR 1065, where Mrs Rowlands sued Merseyside police for assault, false imprisonment and malicious prosecution, the Court of Appeal had examined the role of aggravated damages as compensation and held that Mrs. Rowlands should be awarded aggravated damages even though the police had argued that this would tantamount to compensating her twice. This is because her compensatory damages included an amount for psychological injury. F G
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> *Halsbury's Laws of England* (4th Ed Reissue) para 1148, states that: H
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> > 1148. Aggravated damages. Where the plaintiff's claim is for aggravated damages, the pleading should contain a statement to that effect and should set out the facts on which he relies in support of his claim for such damages ... *The Rules of the Supreme Court do not expressly require that aggravated damages be pleaded, but by application of general principles the plaintiff is required to plead those special facts relied upon in support of the claim.* I
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> *Hence, it is a requirement under English law 'to plead those special facts relied upon in support of the claim' for aggravated damages*. As aggravated damages refer fundamentally to the injury to the feelings and dignity or pride of the plaintiff, facts

relating to and leading to the injury to the feelings and dignity or pride must be pleaded. Our Rules of the High Court 1980 ('RHC') similarly do not provide that aggravated damaged must be categorically pleaded.

However, we cannot deny the fact that *injury to the feelings and dignity or pride is a condition of the mind of the plaintiff as to how he has suffered from the tortious acts of the defendant. Looking at* Order 18 of the RHC *which governs pleadings, I am of the view that facts relating to the injury to the feelings and dignity or pride of the plaintiff may fall within* r 12(1)(b) *of* O 18 *which requires necessary particulars of facts of any condition of the mind, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, to be pleaded.*

I am inclined to find that merely pleading the facts of the acts of the defendant without pleading specifically which of those special facts the Plaintiff alleges to have caused injury to their feelings and dignity or pride does not satisfy the requirement of having pleaded aggravated damages although invariably aggravated damages will appear as a prayer in the claim.

Before the plaintiff cites aggravated damages as a prayer or remedy sought in his claim, he must ensure that the remedy claimed must arise from the facts as made out in the body of the claim; O 18 r 15 of the RHC. From the amended statement of claim of the plaintiff, I find that *the plaintiff has failed to plead the particular facts that the defendant's wrongful acts had caused injury to their feelings and pride or dignity despite the fact that their amendments to the statement of claim was done at the close of the whole case which was with the consent of both the defendant and the third party. This is a fundamental flaw in the plaintiff's claim for aggravated damages.*

...

Each case, of course, will depend on its own facts. In the present case, the defendant was persistent in the piling works because DW1 held the view that the vibrations from the piling works would not cause damages to the neighbouring buildings and secondly, the defendant had a deadline to complete the extension of the hotel to cater for the 1998 Commonwealth Games. The defendant may be adamant in pursuing the piling works to build the Hotel extension but *I do not find that their act to continue with the system of piling is calculated to injure the feelings and dignity of the plaintiff nor did the plaintiff hold the view that their feelings and dignity had been injured; otherwise, they would have or ought to have so pleaded.* (Emphasis added.)

[80] Consequently, the learned judicial commissioner dismissed the claim for aggravated damages. He then dealt with exemplary damages. The discussion on exemplary damages is found in the following passages in that judgment:

In the instant case before this court, it is apparent that the plaintiff is relying on the category that the conduct is calculated to result in a profit to claim for exemplary damages, indeed submission of the plaintiff is confined to this conduct of the defendant. Learned counsel for the plaintiff cited what Lord Devlin had stated in *Rookes v Barnard* that is relevant here as follows:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the

> damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which he either could not obtain at all or not obtain except at a price greater than he wants to put down (*McGregor on Damages* (17th Ed) at pp 178–179).

Learned counsel also cited the principles of law expressed by Lord Morris in *Cassell & Co Ltd v Broome* in the House of Lords which explained the ambit of expression 'calculated to make a profit' used by Lord Devlin as follows:

> There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him. (*McGregor on Damages* (17th Ed) at p 180).

Indeed, the words of Lord Devlin in this respect are imperative that:

> The defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.

By the term 'calculated to', it is no precise mathematical calculation as can be seen in the speeches of Lord Hailsham LC, Viscount Dilhorne and Lord Diplock in *Cassell & Co Ltd v Broome*. The test to be applied in awarding exemplary damages is the nature of the conduct and not the basis of the cause of action; see *Kuddus v Chief Constable of Leicestershine Constabulary* which overruled the decision of the Court of Appeal in *AB v South West Water Services Ltd* [1993] 1 All ER 609 where the Court of Appeal held that exemplary damages could not be awarded for public nuisance or any tort for which exemplary damages had not been awarded before *Rookes v Barnard* ie, a 'cause of action' test which was in addition to the requirement that the defendant's conduct fell into one of the two categories. It is firstly to be noted that as in the case of aggravated damages, there is the same requirement for exemplary damages to be pleaded. *Halsbury's Laws of England* (4th Ed Reissue) para 1147 states:

> *Exemplary damages. The claimant must specifically plead any claim for exemplary damages, together with the facts on which he relies. The assertion of such a claim needs to be made in the body of the claim and not just in the prayer, because all of the facts giving rise to the claim must be set out.*

The general approach of pleadings filed in our court claiming for exemplary damages, to my limited knowledge, is to quote it as a prayer in the statement of claim without specifically pleading it with the facts relied on in the body of the claim. By the rule of pleadings as cited above, that itself is glaringly insufficient for the court to consider the award of exemplary damages least to mention the

A evidential aspect which must necessarily be proved on a balance of probabilities. There is a need to revisit such an approach should exemplary damages be sought as a head of damages claimed so that such claim is specifically pleaded in line with the rules of pleadings. The defendant contended that the plaintiff had failed to plead exemplary damages and is therefore not entitled to such claim. Reading paras 18 and 19 of the amended statement of claim, the fact that the defendant's conduct in persisting with the said piling works notwithstanding the clear breach of their duty of care was thereby to minimise their costs and/or the make a profit at the expense of the plaintiff's and the fact that the costs saving and/or profits would in all likelihood exceed the damages at risk, *I find that these facts introduced by amendments to the statement of claim were specifically pleaded in line with the category of exceptions as listed in Rookes v Barnard ie, where the conduct of the defendant is calculated to result in a profit, although exemplary and/or aggravated damages were only mentioned as a prayer in paragraph 26(iv) therein. Since the facts relied on were specifically pleaded in this case, I am prepared to entertain consideration of such claim even though the words exemplary damages did not appear in the body of the claim but only appeared as a prayer as such prayer derived from the material facts as pleaded in para 18 and 19 in the body of the amended statement of claim* which when read with the wrongful act pleaded is in compliance with O 18 r 15 of the RHC. It would nevertheless be advisable that exemplary damages should be so pleaded with the facts in the body of the claim ... (Emphasis added.)

[81] Apart from aggravated and exemplary damages, the plaintiff here also claimed general damages for the hardship and inconvenience that they had to suffer as a result of the vibrations and damage to the plaintiff's property. The case that was relied upon by the plaintiff is the decision of the Court of Appeal in *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13; [2007] 4 CLJ 293 (CA), where the defendant's (tortfeaser's) appeal against on award of general damages of RM1,000,000 and aggravated damages of RM500,000 was dismissed.

[82] In that case, the defendant's construction actively caused damage to the plaintiff's residential home and the Court of Appeal upheld the award of RM1,000,000 as general damages because of the distress caused to the plaintiff whose house was damaged by the defendant's construction activity in the adjoining property. The following passages are relevant:

[44] We found no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. Practitioners are well aware that general damages represent losses which are not easily quantifiable, with losses in the *like of mental stress, hardship etc as suffered by the respondents, also falling under the heading. There was ample evidence to show that the health of the second respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship when moving house.*

[45] Finally we were unable to default the learned judge for ordering *RM500,000 for a claim of aggravated and/or exemplary damages which is part of general damages. The respondents had given the appellant very early warnings as regards the extent of the*

damages pursuant to its activities but to no avail. No serious preventive measures were undertaken and the sufferings of the respondents merely multiplied. Not only was the property disintegrating before their very eyes but their injured feelings were heightened by the lackadaisical and obnoxious attitude of the appellant. If not for this suit the appellant would have been quite content to remain continuously nonchalant about the whole episode.

[46] The behaviour of the latter not only had affected the respondents but had also attracted the attention and wrath of the authorities (DBKL). Whether such reprehensible behaviour of the appellant, could have attracted aggravated damages, *McGregor on Damages* (16th Ed, 1997) at p 287 had occasion to state:

> The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence or the like.

[47] When ordering any award under the heading of exemplary damages the resources of the appellant would be a relevant consideration. For a company that was about to build a 20 storied two block-building, the above sum of RM500,000 was quite modest, and would make no impact on its means. (Emphasis added)

[83] In the present case, it is obvious enough that the statement of claim is woefully inadequate in respect of a claim for aggravated and exemplary damages. First, there is no prayer or any reference whatsoever in the body of the statement of claim to aggravated and/or exemplary damages.

[84] In any event, even if those words are not used specifically, there must at the very least, be some facts or special facts pleaded to support the claim for aggravated and/or exemplary damages. In terms of aggravated damages, there is also the added requirement under O 18 r 12(1)(b) where matters relating to the state of mind must be pleaded. The rule provides that the following matters must be pleaded:

> (b) *where a party pleading alleges any condition of the mind of any person*, whether any disorder or disability of mind or any malice, fraudulent intention or *other condition of mind* except knowledge, particulars of the facts on which the party relies. (Emphasis added.)

[85] In my view, the statement of claim fails on all counts. The so-called mental distress or the hurt feelings that the plaintiff's directors or staff or shareholders claimed to have suffered ought to have been but was not pleaded. Counsel for the plaintiff latched onto para 13 of the statement of claim to

defend the award of aggravated/exemplary damages of RM100,000 but it is clear from a reading of para 13 of the statement of claim that that only deals with 'Particulars of Negligence'.

[86] In my view, the plaintiff's reliance on the 'Particulars of Negligence' as the basis for aggravated and/or exemplary damages is totally misplaced as those were only particulars relating to the defendants conduct which exemplified or demonstrated their individual or collective breach of duty of care towards the plaintiff.

[87] All that has been set out under 'Particulars of Negligence' is the defendants' conduct pertaining to the construction and development and its impact on the plaintiff's property. In my view, particulars of negligence are exactly that and nothing more. As such, the objection taken by D2 and D3 as to lack of pleadings for aggravated/exemplary damages were well taken and ought to have been upheld by the SAR.

[88] It was therefore an error of principle and misdirection on the part of the SAR to award aggravated/exemplary damages when the statement of claim was bereft of a claim for aggravated/exemplary damages and totally devoid of the necessary particulars in support of such claims. In my view, the evidence provided by the respective witness statements produced on behalf of the plaintiff and their oral testimony cannot make up for the inadequacy of pleadings.

[89] In this case, there was evidence that D1 had abdicated responsibility for the plaintiff's predicament and furthermore, D2 and D3 were also not sympathetic to the plaintiff's plight and merely took refuge in the insurance cover that D3 had obtained from the third party.

[90] In my view, the defendants conduct was not necessarily conduct which demonstrated that they wanted to profit from their own wrongdoing or were desirous of making a profit at the expense of the plaintiff. They in fact took some steps to monitor, mitigate or minimise the damage that was caused to the plaintiff's property. However, the question is whether the defendants conduct was such that there was cynical disregard for the plaintiff's plight. In this regard, the plaintiff's complaint is that instead of taking proactive steps, the defendants allowed the damage to continue and merely asserted that the insurers will handle any claims arising from the damage to the plaintiff's property.

[91] Clearly the fact that D3 had insurance cover for third party damage, did not give any comfort and brought no relief to the plaintiff whose properly was suffering continuous damage due to the construction works that were being undertaken on the adjoining property.

[92] In merely asserting that the insurers would settle all claims, it is clear that D2 and D3 were abdicating their own individual and collective responsibility for the damage that was obviously taking place on the plaintiff's property. It is fair to say therefore that the defendants were not concerned with the plaintiff's complaint as they took comfort in the fact that D3 had insurance cover.

[93] The factual situation here is not very different from the facts in the *Cheong Fatt Tze*'s case. There too the defendants were rushing to complete the project whilst disregarding the adjoining owner's plight. It is my conclusion that it would be apt to describe D2 and/or D3's conduct or response as demonstrating that they had a cynical disregard for the plaintiff's plight. As such, it is only proper that such conduct be impugned by way of an award of exemplary damages. However, the procedural pre-requisite for such an award is that there must proper pleadings for exemplary damages.

[94] As such, based on the evidence that was adduced, I am of the view that there may have been some credible evidence to support a claim for aggravated and/or exemplary damages, although there were no pleadings in support of such a claim. In the upshot, the SAR's failure lay in her decision not to consider and/or to uphold the objection that was taken by counsel D2 and D3 which relates to the absence of pleadings for aggravated and/or exemplary damages.

[95] For those reasons, I was of the view that it was a complete misdirection on the part of the SAR to have awarded aggravated/exemplary damages when the statement of claim was bereft of any pleading by way of reliefs and/or particulars and/or special facts or the factual matrix so as to support a claim for aggravated and exemplary damages. As such, I set aside the award of RM100,000 which was made by the SAR.

[96] The final item that needs to be considered is general damages. Here, a sum of RM150,000 was awarded by the SAR. It is trite that general damages are to be assessed and no particulars are necessary as the matter is 'at large' and the claimant is at liberty to present their case by way of oral or documentary evidence in the ordinary way. Here, the plaintiff had been awarded RM150,000 as general damages for, inter alia , the hardship and inconvenience of having to put up with the noise and interference caused by construction activities that were being carried out on the adjacent property.

[97] Of course, I am mindful that in allowing a claim for general damages, the learned SAR was largely influenced by the decision of the Court of Appeal in *Kris Angsana* where a sum of RM1,000,000 had been allowed. In that case, the plaintiff's house was ruined before his very eyes and he was traumatised by the whole episode.

[98] In the present case, the plaintiff is a company, but it nevertheless is a juristic entity which is capable of suing for any losses that it has suffered as a result of the tortious actions of any tortfeasor. In awarding RM150,000, the SAR said:

> The court hereby took into account the hardship suffered by the plaintiff in dealing with the problem of the damages. Based on the cases law submitted by the plaintiff, the court has granted the amount of RM150,000 being a fair and reasonable sum to be awarded as general damages to the plaintiff.

[99] In my view, the conclusion that was reached by the SAR is unimpeachable, although I do think that she may have been somewhat generous in awarding RM150,000 in the present circumstances, bearing in mind that she had also awarded special damages (albeit erroneously) for alternative accommodation which would or should have mitigated some of the losses suffered by the plaintiffs.

[100] In any event, I did not think that RM150,000 was so outrageous or excessive as to warrant appellate intervention. The general rule in appeals of this nature is that the quantum awarded should not be interfered with unless it is so excessive as to be unreasonable. The principle in this regard was established by the then Federal Court in *Topaiwah v Salleh* [1968] 1 MLJ 284 (FC) which approved a passage from the decision of Greer LJ in *Flint v Lovell* [1935] 1 KB 354 (CA) where he said:

> ... I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled (see p 360).

(See also *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (FC) at p 23).

[101] Having regard to all the circumstances attendant upon this case, I was not at all convinced that the sum of RM150,000 was so unreasonable or

excessive as to warrant any appellate intervention. As such, this part of the SAR's award remained intact. To that extent, D2 and D3's appeal was not allowed.

[102] In the result, my ruling on the various issues may be stated as follows:

(a) special damages must be specifically pleaded and strictly proven. No evidence of any special damages may be adduced if special damages are not pleaded. Hence, even if evidence has been adduced and special damages adequately proven, the failure to specifically plead special damages in the statement of claim is nevertheless, fatal to a claim for special damages;

(b) it is a requirement of O 18 r 12(1) and (2) of the Rules of Court 2012 that all relevant particulars of loss and expense be pleaded in the statement of claim;

(c) the defendants failure to object when evidence on special damages was adduced during the hearing of assessment did not amount to a waiver on their part and they were not precluded from raising the inadequacy or absence of pleadings for special damages as a ground of appeal during the appeal before the judge in chambers;

(d) the inadequacy or absence of pleadings for special damages may be raised as a new point on appeal to the judge in chambers and the point must be considered by the judge (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (FC));

(e) the failure to specifically claim aggravated and/or exemplary damages as a relief is not necessarily fatal. It is however desirable that it be claimed as a specific relief in the statement of claim;

(f) it is however, mandatory for a party claiming aggravated and/or exemplary damages to set out the requisite particulars or the factual matrix or the special facts in the statement of claim to support a claim for aggravated and/or exemplary damages. This would include but is not limited to the mental distress or hurt feelings suffered by the plaintiff's directors, shareholders or staff. The failure to provide the necessary particulars or the factual matrix or special facts for aggravated and/or exemplary damages is fatal. The failure to set out the impugned conduct of the defendants' representatives in the statement of claim for purposes of exemplary damages was fatal to the claim for exemplary damages; and

(g) the plaintiff's reliance on the 'particulars of negligence' as the basis for aggravated and/or exemplary damages was totally misplaced as those were only particulars relating to the defendants conduct which exemplified or demonstrated their individual or collective breach of duty of care towards the plaintiff.

[103] To recapitulate, the outcome is that D2 and D3's appeal (encl 83) is allowed in part. The award of RM211,656.65 and RM654,113 (as costs incurred and rectification costs) are set aside. The award of aggravated/exemplary damages of RM100,000 is also set aside. I made no order as to costs on encl 83 as I did not think that D2 and D3 should be rewarded with any costs as they had failed take up an important point relating to the plaintiff's failure to plead special damages before the SAR. Consequently, the plaintiff's appeal (encl 82) became redundant and was accordingly dismissed with no order as to costs.

Defendants' appeal allowed in part with no order as to costs and plaintiff's appeal dismissed with no order as to costs.

Reported by Kohila Nesan